

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CARRIE S., NEXT OF KIN FOR MATHEW
S

Case No. 3:20-cv-05512-TLF

Plaintiff,

ORDER REVERSING AND REMANDING DEFENDANT'S DECISION TO DENY BENEFITS

**COMMISSIONER OF SOCIAL
SECURITY,**

Defendant.

Plaintiff has brought this matter for judicial review of defendant's termination of her late husband ("Claimant")'s disability insurance ("DIB") benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

1. Did the Administrative Law Judge (“ALJ”) properly evaluate medical opinion evidence?
2. Did the ALJ properly evaluate Claimant’s subjective testimony?
3. Did the ALJ properly evaluate lay testimony from Plaintiff regarding Claimant’s symptoms?
4. Should this matter be remanded for an award of benefits?

II. BACKGROUND

While his appeal was pending before the Appeals Council, Claimant died at age 42, on October 17, 2019, leading to his wife's substitution as Plaintiff. AR 8, 10 (death certificate).

On June 28, 2012, Claimant filed an application for DIB, alleging therein a disability onset date of June 30, 2011. Administrative Record (“AR”) 136. Claimant’s application for DIB was denied upon official review and upon reconsideration. AR 113, 117. A hearing was held before Administrative Law Judge (“ALJ”) Robert P. Kingsley on July 31, 2014. AR 141. On October 8, 2014, ALJ Kingsley issued a decision finding that Claimant was disabled as of the alleged onset date. *Id.*

The Social Security Administration (“Administration”) initiated a continuing disability review process in December 2016. AR 486. On initial review, the Administration found Claimant was no longer disabled as of January 19, 2017. AR 144. On reconsideration, the Administration amended the date of disability cessation to February 13, 2018. AR 163. A hearing was held before ALJ Allen G. Erickson on November 13, 2018. AR 46. On February 19, 2019, ALJ Erickson issued a decision finding Claimant was no longer disabled. AR 18-33. On March 27, 2020, the Appeals Council denied review, making ALJ Erickson’s decision the final decision of the Commissioner. AR 1. Plaintiff seeks review of the denial of her deceased spouse’s benefits, in this Court.

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of Social Security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874

1 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a
2 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*
3 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

4 **IV. DISCUSSION**

5 At the time of the Comparison Point Decision (“CPD”) in 2014, the ALJ found that
6 Claimant had the severe, medically determinable impairments of degenerative disc
7 disease of the cervical spine, status post-anterior cervical discectomy and fusion,
8 degenerative disc disease of the lumbar spine, and obstructive sleep apnea. In the
9 decision at issue here, the ALJ found that Claimant had the severe, medically
10 determinable impairments of cervical spine degenerative disc disease, degenerative
11 joint disease, status post-surgeries, major depressive disorder, and generalized anxiety
12 disorder. AR 122. Based on the limitations stemming from these impairments, the ALJ
13 found that Claimant could perform a reduced range of sedentary work. AR 26. Relying
14 on vocational expert (“VE”) testimony, the ALJ found at step four that Claimant could not
15 perform his past relevant work, but could perform other sedentary jobs at step five of the
16 sequential evaluation; therefore, the ALJ determined at step five that Claimant was not
17 disabled. AR 31

18 **A. Whether the ALJ Properly Evaluated Medical Opinion Evidence**

19 Plaintiff contends that the ALJ erred in evaluating the medical opinion of treating
20 physician Robert Lang, M.D., as well as the opinions of examining psychologist Peter
21 Weiss, Ph.D. and physical therapist Lisa Scheuffele, P.T. Dkt. 16, pp. 3–9. Plaintiff
22 summarizes much of the rest of the medical evidence but fails to make any substantive
23 argument about the ALJ’s evaluation of any opinions or impairments other than those
24 discussed herein. Dkt. 16, pp. 9–13. The Court will not consider matters that are not
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1 “specifically and distinctly” argued in the plaintiff’s opening brief. *Carmickle v.*
2 *Commissioner, Social Sec. Admin.*, 533 F.3d 1155, 1161 n. 2 (9th Cir. 2008) (quoting
3 *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003)). The
4 Court thus will only consider the ALJ’s evaluation of the opinions of the three
5 professionals specifically raised.

6 1. Applicable Law

7 In determining whether a cessation of benefits is warranted, the ALJ follows a
8 seven-step analysis set forth in 20 CFR 416.994(b)(5)(i)–(viii).

9 Until recently, case law in the Ninth Circuit provided that “a prior ruling of
10 disability can give rise to a presumption that the disability still exists.” *Lambert v. Saul*,
11 980 F.3d 1266, 1270 (9th Cir. 2020) (quoting *Patti v. Schweiker*, 669 F.2d 582, 586 (9th
12 Cir. 1982)). Last year, the Ninth Circuit in *Lambert* held that in benefits termination
13 cases, a prior finding of disability will not entitle the claimant to a presumption of
14 continuing disability. *Lambert*, 980 F.3d at 1268. However, an ALJ’s decision regarding
15 medical improvement must still be supported by substantial evidence. *Attmore v. Colvin*,
16 827 F.3d 872, 874 (9th Cir. 2016).

17 The ALJ must provide “clear and convincing” reasons for rejecting the
18 uncontradicted opinion of either a treating or examining physician. *Trevizo v. Berryhill*,
19 871 F.3d 664, 675 (9th Cir. 2017) (quoting *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d
20 1194, 1198 (9th Cir. 2008)). When a treating or examining physician’s opinion is
21 contradicted, an ALJ must provide specific and legitimate reasons for rejecting it. *Id.* In
22 either case, substantial evidence must support the ALJ’s findings. *Id.* Under Ninth
23 Circuit law, opinions from non-examining medical sources that contradict a treating
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1 physician's opinion will trigger the "specific and legitimate reasons" standard of review.
2 See, e.g., *Revels*, 874 F.3d at 662 (requiring only specific and legitimate reasons where
3 treating doctor's opinion was "contradicted by the findings of Dr. Rowse and Dr. Blando,
4 the non-examining doctors from the state agency, and, to some extent, the opinion of
5 Dr. Ruggeri, the hand specialist").

6 Physical therapists are "other sources," and their opinions may be given less
7 weight than those of "acceptable medical sources." *Gomez v. Chater*, 74 F.3d 967, 970–
8 71 (9th Cir. 1996) ("acceptable medical sources" include, among others, licensed
9 physicians and licensed or certified psychologists); *see also* 20 C.F.R. § 404.1527, §
10 416.913(d). Nevertheless, evidence from such "other sources" "may reflect the source's
11 judgment about some of the same issues addressed in medical opinions from
12 acceptable medical sources." 20 C.F.R. § 404.1527, § 416.913(d). Given the fact that
13 they are not acceptable medical sources, however, evidence from these "other sources"
14 may be discounted if, as with evidence from lay witnesses in general, the ALJ "gives
15 reasons germane to each [source] for doing so." *Molina v. Astrue*, 674 F.3d 1104, 1111
16 (9th Cir. 2012) (citations omitted).

17 2. Opinion of Dr. Lang

18 The ALJ erred in discounting Dr. Lang's opinion because the reasons given are
19 not specific or legitimate -- and the reasons are not supported by substantial evidence.

20 Robert Lang, M.D., served as Claimant's treating physician from 2012 through
21 the date of the most recent ALJ decision. See AR 714–29, 968–75, 1055–1120, 1275–
22 1336, 1398–1402, 1409–12. In a statement dated June 20, 2018, Dr. Lang opined that
23 Claimant would be unable to sit, stand or walk for more than two hours in an eight-hour

1 day, that Claimant could stand for ten minutes at a time before needing to sit or walk
2 around, due to lower back pain, and that Claimant could sit for fifteen minutes at a time
3 before needing to stand or change positions. AR 1409. Dr. Lang went on to state that
4 Claimant would need to take unscheduled breaks, including by walking around for 15
5 minutes every 90 minutes. *Id.* Finally, Dr. Lang opined that Claimant would be unable to
6 perform full-time sedentary work. *Id.*

7 In discounting this opinion, ALJ Erickson reasoned that (1) these limitations were
8 internally inconsistent, because Claimant would not be able to walk for 15 minutes if he
9 could only stand for 10; (2) Dr. Lang failed to explain the effect of surgeries Claimant
10 underwent in 2015 and improvements thereafter; and (3) the limitations were
11 inconsistent with those expressed in other medical source opinions. AR 31.

12 With respect to the ALJ's first reason, the ALJ noted that "the claimant cannot
13 walk for 15 minutes if he can stand for just 10 minutes." AR 31. As discussed above, Dr.
14 Lang opined that, due to lower back pain, Claimant could stand for only 10 minutes at a
15 time before needing either to sit down or *walk around*, but would need to take 15-minute
16 walks every 90 minutes. There is no inconsistency between these limitations, and the
17 Commissioner's brief presents no argument supporting a finding of inconsistency.

18 The only plausible explanation for the ALJ's finding was that he misconstrued Dr.
19 Lang's opinion to be that Claimant would be unable to either stand or walk for more than
20 10 minutes at a time, which would be inconsistent with the opinion that Claimant needed
21 to walk around for 15 minutes. Yet the form completed by Dr. Lang did not ask how long
22 Claimant could continuously stand and/or walk before needing a break—instead, it
23 merely sought information regarding how long Claimant could stand before needing to
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1 walk or sit down. Thus, Dr. Lang's opinion that after 10 minutes of standing Claimant
2 would need to change positions, either by sitting or walking, is not inconsistent with the
3 opinion that Claimant would need to walk around for 15 minutes every 90 minutes.

4 As to the ALJ's second reason, an ALJ need not accept a medical opinion that is
5 brief and conclusory when the ALJ faces conflicting evidence regarding the claimant's
6 condition. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). Yet even where a
7 treating physician's opinion is brief and conclusory, an ALJ must consider its context in
8 the record—especially the physician's treatment notes. See *Burrell v. Colvin*, 775 F.3d
9 1133, 1140 (9th Cir. 2014) (holding ALJ erred in finding treating opinion "conclusory"
10 and supported by "little explanation," where ALJ "overlook[ed] nearly a dozen
11 [treatment] reports related to head, neck, and back pain"); *Revels*, 874 F.3d at 663
12 (finding ALJ erred in rejecting treating physician's opinion as supported by "little
13 explanation," where record included treatment notes supporting the opined limitations).

14 Here, the ALJ did not discuss or consider Dr. Lang's longitudinal treatment notes,
15 which tended to support the limitations assessed in his report even after the 2015
16 surgeries. Between June 2017 and October 2017, Dr. Lang repeatedly found that
17 Claimant's neck had abnormal range of motion and tenderness with diminished
18 sensation and reflexes across both of his arms and hands. AR 1278, 1281, 1285, 1288,
19 1290-93, 1297, 1302, 1308, 1311, 1400. On October 31, 2017, Dr. Lang performed a
20 re-exploration of Sager's posterior cervical fusion C6-C7, removal of posterior
21 segmental instrumentation, and reinforcement of cervical fusion with allograft and bone
22 morphogenetic proteins. AR 1313-16. Dr. Lang noted that Mathew S. "has continued to
23 have left arm pain and intermittent weakness in his right arm. His physical exam

1 showed diminished triceps reflexes and diminished sensation, lateral radial left arm.” AR
2 1313–14.

3 After the 2017 surgery, Dr. Lang found that Claimant continued to exhibit left-
4 sided pain with testing the left deltoid and triceps, that his grip strength was abnormal
5 with his left hand weaker than his right, and that his upper extremity reflexes were
6 unequal, with his left side more diminished than his right. AR 1285. Between November
7 2017 and February 2018, Dr. Lang continued to find that Claimant had abnormal
8 posture with his head forward of his sternum, limited range of motion in his neck,
9 diminished pinprick sensation on his left arm and hand, and unbalanced reflexes
10 between his left and right arms. AR 1278, 1281, 1285, 1400.

11 The ALJ’s evaluation of Dr. Lang’s opinion omitted any discussion of these notes.

12 Addressing the ALJ’s third reason, the existence of a conflict among the medical
13 opinions of Drs. Lang, Leinenbach and Irwin, is not, in itself, a reason for choosing one
14 doctor’s opinion over the others; rather, it only establishes an issue the ALJ must
15 resolve. See *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (“The ALJ is
16 responsible for determining credibility, resolving conflicts in medical testimony, and for
17 resolving ambiguities.”). As stated above, applicable Ninth Circuit precedent allows an
18 ALJ to reject the controverted opinion of an examining doctor by identifying “specific and
19 legitimate reasons that are supported by substantial evidence in the record.” *Lester v.*
20 *Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995) (citing *Andrews*, 53 F.3d at 1043). Stating
21 only that a conflict exists, without more, is not a specific and legitimate reason to reject
22 the opinion of a treating source.

23 Harmless error principles apply in the Social Security context. *Molina*, 674 F.3d
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1 at 1115. An error is harmless only if it is not prejudicial to the claimant or
2 “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v. Comm'r*
3 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); see *Molina*, 674 F.3d at 1115.
4 The determination as to whether an error is harmless requires a “case-specific
5 application of judgment” by the reviewing court, based on an examination of the record
6 made “without regard to errors’ that do not affect the parties’ ‘substantial rights.’”
7 *Molina*, 674 F.3d at 1118–19 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

8 In this case, the ALJ’s error was not harmless. If the ALJ had properly considered
9 the opinions of Dr. Lang, the ALJ may have incorporated limitations from these opinions
10 in making a determination as to Claimant’s residual functional capacity. If the ALJ
11 incorporated such limitations, in turn, the continuing disability determination may have
12 changed. Accordingly, the ALJ’s error was not harmless and requires reversal.

13 3. Opinion of Dr. Weiss

14 The ALJ did not address Dr. Weiss’s finding regarding sustained concentration
15 and persistence, and the ALJ failed to provide reasoning that would reconcile this
16 finding with the ALJ’s ultimate decision; therefore the ALJ’s reasoning and decision on
17 this point is insufficiently developed and cannot effectively be reviewed by this Court.

18 Peter A. Weiss, Ph.D., examined Claimant on October 11, 2017; Dr. Weiss
19 opined that Mathew S. suffered from moderate, recurrent major depressive disorder
20 with anxious distress. AR 1267-1272. Performing a mental status examination, he noted
21 that although Claimant’s performance was adequate or good in most categories, his
22 attention and concentration were less than adequate. Dr. Weiss stated that Claimant:

23 . . . does appear to have some social impairment but he appears to
24 maintain a few positive interpersonal relationships. His sustained

1 concentration and persistence appear markedly impaired by his
2 depression, as exemplified by his self-report of limited daily activities
3 outside the home and his performance on the cognitive portion of the
mental status examination. His overall adaptive impairment due to his
Major Depressive Disorder appears moderate.

4 AR 1270.

5 The ALJ stated that he found Dr. Weiss's opinion "persuasive," and did not single
6 out any portion of the opinion for discounting. However, Plaintiff notes that the ALJ did
7 not adopt Dr. Weiss's finding regarding sustained concentration and persistence—
8 where Dr. Weiss opined that these "appear[ed] markedly impaired," the ALJ found that
9 Claimant had only a moderate limitation in this area. See Dkt. 19, p. 4; AR 25, 1270.

10 The Commissioner avers that the ALJ adequately addressed Dr. Weiss's opinion
11 in Claimant's residual functional capacity determination by "limiting the claimant to
12 following short and simple instructions involving routine tasks, but 'not in a fast-paced,
13 production-type environment.'" Dkt. 17, p. 12 (citing AR 26). However, the ALJ did not
14 explicitly connect this limitation to his evaluation of Dr. Weiss's opinion, and this Court
15 will not affirm the ALJ's decision based on speculation that such a connection was
16 implied.

17 "Long-standing principles of administrative law require us to review the ALJ's
18 decision based on the reasoning and factual findings offered by the ALJ—not *post hoc*
19 rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray*
20 *v. Commissioner of Social Security Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) (citing
21 *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

1 4. Opinion of P.T. Scheuffele

2 Lisa Scheuffele, P.T., was Claimant's treating physical therapist from 2014 on,
3 assisting in his recovery after a series of neck and shoulder surgeries in 2014 and 2015.
4 At the time of Claimant's discharge from physical therapy, she stated that Claimant had
5 "plateaued in his progress for his cervical spine condition," and that his "[g]uarding
6 muscle tone is decreased, but the muscles fatigue easily with light exercises and
7 [activities of daily living], which causes them to tighten up." AR 1581.

8 Ms. Scheuffele also stated that "[e]xercises involving reaching overhead, looking
9 up, or looking down for more than a few minutes increases pain and tension," he
10 reported "his [activity] level has remained the same," and that his "score for the Neck
11 Disability Index improved slightly from complete disability to severe disability." *Id.* In her
12 opinion, Claimant's ability to carry, move, and handle objects remained between 40
13 percent and 60 percent impaired, and he was "not able to carry out a full time job, either
14 sedentary or active." AR 1581. The ALJ did not discuss these statements in his
15 decision.

16 Physical therapists are "other sources" whose testimony may be discounted if the
17 ALJ "gives reasons germane to each [source] for doing so." *Molina*, 674 F.3d at 1111
18 (citations omitted). However, an ALJ may not reject significant probative evidence
19 without explanation and must state reasons for disregarding such evidence. *Flores v.*
20 *Shalala*, 49 F.3d 562, 570–71 (9th Cir. 1995).

21 The Commissioner asserts that even if an ALJ errs by not discussing evidence,
22 the error is harmless where the same reasons the ALJ gave for rejecting other, similar
23 evidence apply equally to the unaddressed evidence. Dkt. 17, p. 14 (citing *Molina*, 674

1 F.3d at 1121–22, and *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th
2 Cir. 2009). The Commissioner argues that, because the limitations discussed in Ms.
3 Scheuffele's notes were similar to those assessed by Dr. Lang, the reasons given by
4 the ALJ for rejecting Dr. Lang's opinion apply equally to Ms. Scheuffele's notes. *Id.* But
5 the source's statements are not identical, and, as discussed above, the ALJ failed to
6 give specific and legitimate reasons for rejecting Dr. Lang's opinion. Thus, the ALJ's
7 failure to address Ms. Scheuffele's statements was not harmless and requires reversal.

8 B. Whether the ALJ Properly Evaluated Claimant's Symptom Testimony

9 Plaintiff contends that the ALJ improperly discounted Claimant's subjective
10 symptom testimony. Dkt. 16, pp. 13–16. As discussed below, the ALJ's adverse
11 credibility finding regarding Claimant's subjective symptom testimony was not supported
12 by substantial evidence, and this was harmful error.

13 To reject a claimant's subjective complaints, the ALJ's decision must provide
14 "specific, cogent reasons for the disbelief." *Lester*, 81 F.3d at 834 (citation omitted).
15 The ALJ "must identify what testimony is not credible and what evidence undermines
16 the claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).
17 Unless affirmative evidence shows the claimant is malingering, the ALJ's reasons for
18 rejecting the claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at
19 834. "[B]ecause subjective descriptions may indicate more severe limitations or
20 restrictions than can be shown by medical evidence alone," the ALJ may not discredit a
21 subjective description "solely because it is not substantiated affirmatively by objective
22 medical evidence." *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

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1 Claimant testified he had difficulties with pushing and pulling anything heavier
2 than a gallon of milk, and that to lift a gallon of milk he would have to lift and carry it
3 close to his chest to avoid neck pain. AR 83. This neck pain also required him to be
4 careful with how his neck is turning or facing; this prevented him from turning his head
5 and necessitated extra care when lifting his head up. AR 83, 89. Claimant testified that
6 his neck issue causes him constant pain, headaches, and nausea. AR 66.

7 Claimant also testified that he could only walk a few blocks before he would need
8 to stop, he can only stand for 10 minutes at a time before his neck starts to hurt -- he
9 stated that “[s]tanding’s worse” -- and he cannot squat down or bend over. AR 84, 89.
10 Claimant testified that he has shooting pains in his arms, constantly drops items and
11 knocks objects over. AR 66-67, 84. Claimant also stated, Dr. Lang instructed him to
12 keep his legs elevated due to his heart and leg conditions. AR 80. Claimant testified he
13 could not mow the grass, vacuum, clean, cook, or wash dishes due to pain symptoms in
14 his neck and numbness on his fingers; even filling out paperwork and holding items
15 caused his hands to go numb. AR 77-78. Claimant testified that, on an average day, he
16 usually does not leave his room and spends his time laying down in bed due to his
17 discomfort. AR 78-79.

18 Regarding mental health symptoms, Claimant testified that he has depression
19 and anxiety and that he takes medication for these conditions, but such symptoms
20 remained a “constant hurdle” and had “gone downhill” after his most recent surgery and
21 a series of concussions. AR 73-75, 81. Claimant testified that his medications caused
22 side effects of fatigue and insomnia. AR 87-88. He also stated that he suffered from
23 fatigue due to an HIV infection. AR 71.

1 In not fully crediting Claimant's subjective symptom testimony, the ALJ reasoned
2 that the objective medical evidence did not support the degree of limitation alleged, and
3 instead pointed to medical improvement to the level where Claimant was no longer
4 disabled. AR 29.

5 An inconsistency with the objective evidence may serve as a clear and
6 convincing reason for discounting a claimant's testimony. *Regennitter v. Comm'r of*
7 *Social Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998). But an ALJ's decision may not
8 reject a claimant's subjective symptom testimony "solely because the degree of pain
9 alleged is not supported by objective medical evidence." *Orteza v. Shalala*, 50 F.3d 748,
10 749-50 (9th Cir. 1995); *Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995) (applying
11 rule to subjective complaints other than pain).

12 Here, the ALJ pointed to physical and psychological consultative examination
13 findings from Drs. Leinenbach and Weiss, respectively, indicating that Claimant could
14 sustain a full time work schedule on a regular and continuing basis, as well as physical
15 examination findings and treatment notes that reflected "no worsening, and
16 improvement since the 2015 surgery." The ALJ stated that "the claimant's pain never
17 seems to be at severely high levels, and he has had a good recovery since the last
18 surgery." AR 29. As for psychiatric symptoms, the ALJ noted that they were "generally
19 stable on medication, with no impact on mental functioning." *Id.*

20 These examinations and reports from Drs. Leinenbach and Weiss do not, on
21 their own, contradict Claimant's subjective testimony. Notably, the physical and
22 psychological consultative examinations occurred prior to Claimant's most recent
23 surgery before the hearing. AR 1265, 1270. The physical examination findings do not
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1 account for Claimant's continuing pain symptoms in his lumbar and cervical spine. AR
2 1265.

3 As discussed above, the ALJ also omitted any discussion of Dr. Weiss's finding
4 that Claimant had marked limitations in sustained concentration and persistence. AR
5 29. While the Commissioner asserts that the ALJ validly discounted this finding as
6 inconsistent with the rest of Dr. Weiss's opinion, their argument is unpersuasive
7 because the ALJ did not address this finding at all. In addition, because the date of Dr.
8 Weiss's opinion was prior to Claimant's most recent surgery, it would have been
9 impossible for Dr. Weiss to give an opinion to contradict Claimant's testimony about
10 worsening psychological symptoms subsequent to surgery. The surgery had not
11 happened yet -- the most recent surgery was performed after Dr. Weiss gave his
12 opinion. AR 73.

13 The ALJ failed to discuss medical evidence that did not support his ultimate
14 decision -- which included surgeries on Claimant's right metacarpophalangeal joint;
15 knee surgery; evidence Claimant was required to keep his legs elevated, and diagnoses
16 of synovitis, spondolysis, and other nerve conditions. See, e.g. AR 1464, 1477–78,
17 1482, 1538. This selective summary of the medical evidence that supported one
18 conclusion while omitting evidence that did not support such a conclusion, shows the
19 ALJ erred by cherry-picking. See *Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir. 2014)
20 (ALJ may not “cherry-pick[]” items from treatment record without considering them in
21 context of “diagnoses and observations of impairment”).

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1 C. Whether the ALJ Properly Evaluated Lay Witness Statements

2 Finally, Plaintiff avers that the ALJ erred by failing to evaluate lay witness
 3 testimony from Claimant's wife—the Plaintiff in this action. Dkt. 16, pp. 16–17. The
 4 Plaintiff's argument is persuasive; in this case, the ALJ's discounting of lay witness
 5 testimony was not supported by substantial evidence.

6 Lay testimony regarding a claimant's symptoms "is competent evidence that an
 7 ALJ must take into account," unless the ALJ "expressly determines to disregard such
 8 testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236
 9 F.3d 503, 511 (9th Cir. 2001). In rejecting lay testimony, the ALJ need not cite the
 10 specific record as long as "arguably germane reasons" for dismissing the testimony are
 11 noted, even though the ALJ does "not clearly link his determination to those reasons,"
 12 and substantial evidence supports the ALJ's decision. *Id.* at 512.

13 If the ALJ has provided proper reasons to discount the lay testimony in another
 14 aspect of the written decision, such as within the discussion of the claimant's testimony,
 15 the lay testimony may be considered discounted properly even if the ALJ fails to link
 16 explicitly the proper reasons to discount the lay testimony to the lay testimony itself. See
 17 *Molina*, 674 F.3d at 1121 (quoting *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001)).

18 In a third-party function report dated November 5, 2018, Plaintiff stated that due
 19 to Claimant's neck and back pain, he could not stand or walk for more than 5 to 10
 20 minutes without having to sit or lay down, and could sit in a chair for 10 to 15 minutes at
 21 a time before he would need to lay down due to his pain symptoms. AR 569–70. Plaintiff
 22 stated that Claimant had to lay down on multiple occasions per hour throughout the day
 23 due to his pain symptoms and to relieve pressure from his neck, which needed constant

1 support. AR 571. Plaintiff stated that if Claimant sat or stood for a couple of hours, he
2 would be bed-ridden for the next couple of days. AR 571.

3 Plaintiff stated that Claimant could only go grocery shopping for 10 to 15 minutes
4 before he would need to sit or lay down in order to relieve his back and neck pain. AR
5 569. Plaintiff stated that on a lot of occasions while out walking, Claimant's legs and
6 knees would give out. AR 570. Plaintiff stated that if Claimant stood at the bathroom
7 sink to shave for 5 minutes, he would need to lay down and ice his lower back to relieve
8 the pain. AR 570. Plaintiff stated that Claimant was unable to put dishes away due to
9 the nerve damage in hands and dropping things. AR 571.

10 Plaintiff stated that Claimant had numbness in two of the fingers on his left hand
11 and that he had issues with dropping items, and he had a torn ligament on his right
12 thumb which made it difficult for him to hold onto things. AR 570. Finally, she stated that
13 Claimant was depressed, did not often leave the house, and was withdrawn from friends
14 and family. *Id.*

15 The ALJ did not address the Plaintiff's lay witness statement in his decision;
16 therefore, no reasoning exists for this Court to review. "Long-standing principles of
17 administrative law require us to review the ALJ's decision based on the reasoning and
18 factual findings offered by the ALJ—not *post hoc* rationalizations that attempt to intuit
19 what the adjudicator may have been thinking." *Bray v. Commissioner of Social Security*
20 *Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S.
21 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

22 The ALJ's decision regarding lay witness evidence is not supported, and the
23 error was harmful.

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1 D. Remand for Award of Benefits

2 Plaintiff asks this Court to remand for an award of benefits. “The decision
 3 whether to remand a case for additional evidence, or simply to award benefits[,] is within
 4 the discretion of the court.” *Trevizo*, 871 F.3d at 682 (quoting *Sprague v. Bowen*, 812
 5 F.2d 1226, 1232 (9th Cir. 1987)). If an ALJ makes an error and the record is uncertain
 6 and ambiguous, the court should remand to the agency for further proceedings. *Leon v.*
 7 *Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Likewise, if the court concludes that
 8 additional proceedings can remedy the ALJ’s errors, it should remand the case for
 9 further consideration. *Revels*, 874 F.3d at 668.

10 The Ninth Circuit has developed a three-step analysis for determining when to
 11 remand for a direct award of benefits. Such remand is generally proper only where

12 “(1) the record has been fully developed and further administrative
 13 proceedings would serve no useful purpose; (2) the ALJ has failed to
 14 provide legally sufficient reasons for rejecting evidence, whether claimant
 15 testimony or medical opinion; and (3) if the improperly discredited
 16 evidence were credited as true, the ALJ would be required to find the
 17 claimant disabled on remand.”

18 *Trevizo*, 871 F.3d at 682–83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.
 19 2014)).

20 The Ninth Circuit emphasized in *Leon* that even when each element is satisfied,
 21 the district court still has discretion to remand for further proceedings or for award of
 22 benefits. 80 F.3d at 1045.

23 Here, as discussed above, the ALJ did not provide clear and convincing reasons
 24 for discounting Claimant’s or Plaintiff’s testimony; nor did the ALJ provide specific and
 25 legitimate reasons for discounting the opinions of Drs. Lang and Weiss, or Ms.
 Scheuffele. The Court is mindful that, in light of Claimant’s tragic death, a remand for

1 further proceedings in this case would be of limited utility, as no new testimony or
2 medical evaluations would be forthcoming, and providing another opportunity to assess
3 improperly evaluated evidence does not qualify as a remand for a “useful purpose”
4 under the first part of the credit as true analysis. *Garrison*, 759 F.3d at 1021-22, citing
5 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“Allowing the Commissioner to
6 decide the issue again would create an unfair ‘heads we win; tails, let’s play again’
7 system of disability benefits adjudication.”).

8 If Claimant’s and Plaintiff’s testimony, and the opinions of Drs. Lang, Weiss, and
9 Ms. Scheuffele were credited as true, particularly Dr. Lang’s opinion that Claimant could
10 not perform any type of sedentary work, the ALJ would be required to find Claimant
11 disabled on remand. AR 792, 868-71; see *Lingenfelter v. Astrue*, 504 F.3d 1028, 1041
12 (9th Cir. 2007) (“[W]e will not remand for further proceedings where, taking the
13 claimant’s testimony as true, the ALJ would clearly be required to award benefits.”).

14 Accordingly, remand for an award of benefits is the appropriate remedy.

15 CONCLUSION

16 Based on the foregoing discussion, the Court finds the ALJ erred when he
17 determined Claimant to be not disabled. Defendant’s decision to deny benefits therefore
18 is REVERSED and this matter is REMANDED to the Commissioner for an award of
19 benefits.

1 Dated this 25th day of August, 2021.
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Theresa L. Fricke
United States Magistrate Judge